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No. 82-1150

IN THE

Supreme Court of the United States

October Term, 1982

HOWARD ELLIS, *et al.*,

Plaintiffs-Petitioners,

vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, *et al.*,

Defendants-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE STATE BAR OF CALIFORNIA AS AMICUS CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN NO. 82-1150.

The State Bar of California is a unified bar created by the California Legislature and the voters of California. It is one of a number of unified state bars in the United States.

The California State Bar, as a movant, has sought consent of the partis set forth as Petitioners and Respondents in this case. Counsel for Respondents have not responded to our requests for consent to the filing of the brief. Counsel for Petitioners consented to the filing only upon the condition that the State Bar perform certain acts which it is not authorized by law to perform. *See* letter attached to this application as Exhibit 1. Therefore, this application for leave to file the brief *amicus curiae* attached to this motion is presented under Rule 36 of the rules of this Court prior to the expiration of the filing dates for the briefs of the parties

being supported herein.

Movant seeks to submit this brief *amicus curiae* to invite the Court's attention to the differences between unified bars and labor unions, and to seek to have the Court confine its decision in the case presently pending to labor unions, so that the different issues involved in the unified bar context may be decided directly on their merits by this Court. The refusal of Petitioners to give consent illustrates the need for the State Bar to file this brief, as it indicates that a decision of this Court that is not limited to the union situation would be followed by an attack on the unified bars based on that decision.

Movant also seeks by this brief to support the position of Respondents, upholding the principles of Court of Appeal's broad grant of authority to organizations, as the State Bar feels that such broad authority is necessary and, at the same time, fully protects the rights of minority members of organizations.

Accordingly, movant respectfully requests that the Court grant leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF THE STATE BAR OF CALIFORNIA AS AMICUS CURIAE.

Interest of the Amicus Curiae.

This case presents the question of which union activities may be funded using mandatory fees or dues imposed pursuant to valid union shop and agency shop agreements. The Ninth Circuit set forth rules for that allocation for the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) in *Ellis v. BRAC*, 685 F.2d 1065 (9th Cir. 1982). The Court's decision, however, if not narrowly drawn, could have an adverse impact in fields outside of the specialized union area, specifically on First Amendment challenges to unified bars which are pending in a number of state courts[1] and are likely

[1]A listing of cases presently pending challenging unified state bars is attached as Appendix A.

to reach the Supreme Court by petition for certiorari.

The State Bar of California ("State Bar") is a unified bar created by the California Legislature and the voters of California. Its existence and activities are authorized, and clearly limited and controlled, by constitutional and statutory provisions. (Cal. Const. Art. VI, § 9, Bus. & Prof. Code §§ 6000, *et seq.*) It is a public corporation of the State of California. *State Bar of California v. Superior Court*, 207 Cal. 323 (1929). Fees payable by California lawyers as a condition to practice are set by statute.

Article VI, § 9 of the California Constitution provides that all persons admitted and licensed to practice law in California shall be members of the State Bar, with the exception of judges. Membership is divided into two classes: active and inactive.[2] As of January, 1983, there are 77,320 active and 8,246 inactive members.

California statutes expressly authorize the State Bar to engage in the following activities, *inter alia*: advancement of the science of jurisprudence;[3] improvement of the administration of justice;[4] promotion of relations of the bar with the public;[5] advancement of the professional interests of the members of the State Bar;[6] and performance of actions necessary to the administration and purposes of the State Bar.[7]

The purpose of this *amicus curiae* brief is to invite the Court's attention to the difference between unified bars and labor unions and to respectfully request that the Court narrowly limit its holding in the instant case so as not to ad-

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[2]Bus. & Prof. Code § 6003.
[3]*Id.* at § 6031.
[4]*Id.*
[5]*Id.*
[6]*Id.*
[7]*Id.* at § 6001.

versely affect the ultimate determination[8] of the permissible scope of activities of unified state bars.

I.
INTRODUCTION AND SUMMARY OF ARGUMENT.

The legal and factual distinctions between private organizations, such as labor unions, and public corporations, such as *amicus*, require different analyses in determining the scope of activities which may be financed with compulsorily obtained funds. There are presently pending cases which raise this issue in the unified bar context, which must be decided on their own merits, rather than by implications drawn by lower courts from a decision of this Court in an arguably analogous area of the law. Therefore, *amicus* respectfully requests this Court to limit its decision in the case now pending before it to the difficult questions raised in the labor context, reserving the issue of unified bars to a case which fully presents the substantial and unique issues raised in that context alone.

II.
ARGUMENT.

A. Unified Bars Are Governmental Entities Organized to Serve the Public.

The concept of a unified bar survived constitutional challenge in *Lathrop v. Donahue*, 367 U.S. 820, *reh'g denied*, 368 U.S. 871 (1961). There, a plurality of the court ruled that freedom of association was not violated by requiring a lawyer to pay his share of the cost of elevating the educa-

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[8]Should this Court decline to so narrow its decision, however, *amicus* respectfully suggests that the principles applied by the court below preserves the proper balance between authorized actions approved by a majority of an organization's membership and the rights of a dissenting minority. A more restrictive approach would unnecessarily restrain the ability of the organization to function in the best interests of its membership and, in the unified bar context, in the public interest.

tional and ethical standards of the bar so as to improve the quality of legal services available to the public.

This honorable Court in *Lathrop* left open the question of the manner in which mandatory fees could be used without violating the First Amendment rights of members of unified bars. This question must be faced squarely, as it has been raised in the various cases challenging the constitutionality of unified state bars listed in Appendix A. Although the analogy to the rationale of the union cases is attractive, as mandatory payments by dissenting members are involved in each, *amicus* respectfully asserts that the analogy is inappropriate. There are fundamental distinctions between the organizations involved and the purposes for which they are established; those fundamental differences mandate a different analysis of the problems involved.

Unified bars, including *amicus*, are public entities created either by rule of Court, or by legislative or constitutional authorization. *Amicus*, the California State Bar, is a public agency of the State of California authorized by the Legislature, Bus. & Prof. Code §§ 6001, *et seq.*, and the California Constitution, Article VI, § 9. It serves governmental functions delegated to it by the Constitution, the Supreme Court, and the Legislature. *State Bar of California v. Superior Court, supra*, 207 Cal. 323. Its functions are explicitly and implicitly authorized in detail by the Legislature.

The Bar, through this establishing authority, is instructed to undertake substantial duties in the public interest and to improve the administration of justice. Bus. & Prof. Code § 6031. In California, there has been a fifty-five year history of performance of these public duties and responsibilities by the State Bar.

B. Labor Unions Serve Private Economic Interests.

In contrast to the unified bars, labor unions primarily serve the limited economic interests of their membership, rather than the broad public interest. A union is a private

organization serving private interests.

The union shop or agency shop situation, in which a union is entitled to collect dues or fees from those who would not voluntarily be members of the union, has, as its central purpose, protection of union members from "free riders." The elementary principle of fairness involved is the prevention of benefit without payment; since the union must represent all of the employees in the bargaining unit (N.L.R.A., 29 U.S.C. § 159a), nonmembers would benefit to the same degree as members from union activities, but, in the absence of these provisions, they would benefit without payment. *See, e.g., NLRB v. General Motors Corp.*, 373 U.S. 734, 740-41 (1963) ("[I]n the absence of a union security provision 'many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.' "); *Radio Officers Union v. NLRB*, 347 U.S. 17, 41 (1954). *See also* Hopfl, *The Agency Shop Question*, 49 Corn. L.Q. 478 (1964) ("[t]he nonmember has, and always will, accept the gains obtained by the bargaining agent for him and he cannot complain if he is called upon to bear his share of the expense").

In contrast, the purposes of a unified bar, and the concomitant mandatory fees it receives, are quite different. The unified bar is the vehicle through which lawyers fulfill their obligations to themselves, the courts, and the public. Whereas mandatory dues set by a union are set within the context of its private organizational needs, the mandatory fees paid by the members of the State Bar of California are set by the California State legislature after consideration of the programs and activities proposed by the State Bar. The California fees are thus a tax the use of which is limited only by state and federal limitations upon expenditure of public funds.

Further, in the bar situation, there is no infringement upon the democratic process in the determination of expenditures. Whereas nonmembers forced to pay union dues lack any opportunity to influence a union's expenditures for causes to which they are opposed, members of unified state bars, which are public entities embodying representative democracy, are ensured of the opportunity to voice their opinion through that democratic process.

III.
CONCLUSION.

For the reasons outlined in this *amicus curiae* brief, *amicus* the State Bar of California respectfully requests this Court to limit its decision in the case now pending before it, and the effect of *Abood v. Detroit Board of Education*, 431 U.S. 209, *reh'g denied*, 433 U.S. 915 (1976), to the labor union context. This would permit the Court to determine the fundamentally different question of the unified bar within the context of its own facts. Because the Court will be presented with such a case within the near future, *amicus* respectfully suggests that a narrow decision is critical in the case at bar. *Amicus* also respectfully suggests that, in the union context, the principles applied by the court below be approved.

Respectfully submitted,

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APPENDIX A.

Pending Challenges to Unified Bar Associations.

1) *Puerto Rico.*

Robert E. Schneider, Jr., et al. v. Colegio de Abogados de Puerto Rico, et al., U.S.D.C. Dist. of Puerto Rico Nos. 82-1459, 82-1513, 82-1514, 82-1532. Decided June 16, 1983.

This suit was brought on June 9, 1982, challenging, *inter alia*, the use by the Puerto Rico Bar of mandatory bar dues and funds derived from required fees for notarial and "forensic" stamps, for alleged political and ideological purposes. The complaint sought declaratory and injunctive relief in addition to damages.

The District Court enjoined the Bar from taking any action against any member of Colegio for failure to pay membership dues or failure to pay notarial and "forensic" stamp fees, and awarded plaintiffs damages of $1. Defendants filed an appeal in the First Circuit of the U.S. Court of Appeals on August 4, 1983.

2) *Michigan.*

Falk v. State Bar of Michigan, 411 Mich. 63, 305 N.W.2d 201 (1981).

A member of the State Bar of Michigan filed a Petition for Special Relief in the Michigan Supreme Court in 1977, requesting that he not be required to pay that portion of his mandatory bar dues which is used by the Michigan Bar to finance certain activities to which he objects.

By *per curiam* decision filed April 29, 1981 the Court stated that it had been unable to reach a majority decision on the matter and ordered that a master be appointed to conduct an additional evidentiary hearing. Pursuant to that

order, additional hearings were conducted after which the master submitted findings of fact and recommendations to the Supreme Court. The matter remains pending.

3) *Florida.*

The Florida Bar Re Amendment To Integration Rule (Supreme Court of Florida No. 61,424).*

In November 1981, 25 members of the Florida Bar petitioned the Supreme Court of Florida requesting the Court to amend the Florida Bar Integration Rule so as to prohibit the Board of Governors of the Florida Bar from engaging in political activity on behalf of the Florida Bar. In addition to the rule change, the petitioners also requested that the Court enjoin the Board from spending 1981-82 budgeted funds for "political activities." The matter remains pending.

4) *California.*

Keller v. State Bar, Sac.Sup.Ct.Civ. No. 307168; *Grace v. State Bar*, LASC No. C424821.

In two lawsuits, members of the State Bar have challenged the use of mandatory dues for activities to which plaintiffs object, including alleged political activities. The *Keller* plaintiffs sought preliminary injunctive relief, which was denied. Both cases are in the pre-trial stage.

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*The Florida Bar is a unified or integrated bar created by court rule instead of legislative enactment.